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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 987

PEARLINE PORTER, PAULINE P. LEONARD and GEORGE C. KEMBLE, Trustee,

Petitioners,

vs.

GLADYS E. PORTER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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and GEORGE C. KEMBLE, Trustee,
Petitioners,

vs.

GLADYS E. PORTER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Arizona, entered in the above-entitled case on July 14, 1966.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Arizona, dated July 14, 1966, reported at 101 Ariz. 131, 416 P.2d 564, is printed in the accompanying Appendix pp. 1-37.[1]

Other opinions delivered in this case, consideration of which

[1]All future references to the instant opinion will be limited to the Pacific Reporter since the official report has not yet been published.

is necessary herein, are those of the Court of Appeals of Arizona, dated June 21, 1965, reported at 1 Ariz. App. 363, 403 P.2d 298, (Appendix pp. 38-48) and of the Supreme Court of Idaho, dated July 12, 1962, reported at 84 Idaho 400, 373 P.2d 327. (Appendix pp. 49-59)

The following are other opinions of the Supreme Court of Arizona dealing with the earlier stages of the litigation between petitioners, respondent, and respondent's former husband, Arnold Porter:

Kemble v. Stanford, 86 Ariz. 392, 347 P.2d 28 (1959); *Porter v. Stanford,* 86 Ariz. 402, 347 P.2d 35 (1959), *cert. denied,* 371 U. S. 829 (1962); *Kemble v. Porter,* 88 Ariz. 417, 357 P.2d 155 (1960).

JURISDICTION

The decision of the Supreme Court of Arizona was filed on July 14, 1966. Motions for rehearing were denied on October 25, 1966. (Appendix p. 155) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

I. Whether, consistent with the full faith and credit clause of the Constitution of the United States, the courts of one state may permit relitigation of questions of law and jurisdiction by way of collateral attack on a sister-state judgment, where the party attacking the judgment appeared and participated in the foreign action and actually litigated, or had an opportunity to litigate, all the issues reopened in the collateral attack.

II. Whether, where all interested parties appear personally and participate in procuring a sister-state judgment, the courts of a second state may, consistent with the full faith and credit clause of the Constitution of the United States, deny recognition to and enforcement of the sister-state judgment on the ground

that the foreign court denied full faith and credit to alleged prior inconsistent judgments of the courts of the second state.

III. Whether, where two successive actions between the same parties in different states result in inconsistent judgments, the courts of the state of the first judgment may, consistent with the full faith and credit clause of the Constitution of the United States, refuse to view the second, in personam judgment as binding on the parties with respect to the issues litigated in the second action.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following constitutional and statutory provisions:

(1) Constitution of the United States, Article IV, Section 1, which provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

(2) Act of June 25, 1948, Ch. 646, 62 Stat. 947, 28 U.S.C. Section 1738, which provides:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

(3) Certain provisions of the Idaho Code which are printed in the Appendix.

STATEMENT OF THE CASE

The protracted litigation between and among the parties mentioned below has revolved largely around a dispute concerning ownership of certain real property situated in the State of Arizona, the Arizona Hotel. An account follows of the chain of events culminating in the instant decision of the Arizona Supreme Court leaving title to the property in respondent.

In December, 1958, Gladys Porter, respondent herein, left Idaho, where she had lived for several years with her then husband, Arnold Porter, came to Arizona and established residency. In February, 1959, she instituted in Arizona a separate maintenance action against Arnold. The husband was not personally served and made no appearance whatever in the action. Her complaint therein alleged that the Arizona Hotel, located in downtown Phoenix, was community property of the couple.[2] Pearline Porter and Pauline P. Leonard, Arnold Porter's sisters and petitioners herein, intervened in the separate maintenance action claiming that the Arizona Hotel was not the couple's community property but was partnership property in which the sisters owned a substantial interest.[3] On May 14, 1959, a decree of separate maintenance was entered ordering, *inter alia,* periodic support and maintenance payments for Gladys. The judgment imposed a lien

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[2]Abstract of Record pp. 3-4. All future citations to the Abstract of Record in the Arizona Supreme Court are designated "A.R."; those to the Supplemental Abstract of Record are designated "Supp. A.R."

[3]A.R. pp. 13-15.

upon any of the couple's community interest in the Arizona Hotel to secure the payments.[4]

On May 25, 1959, petitioner Georgé C. Kemble, as trustee for the children of Gladys and Arnold, obtained an Arizona judgment against Arnold Porter and an order charging Arnold's partnership interest in the hotel.[5] Petitioner Kemble intervened in the separate maintenance action on December 14, 1959, asserting his rights as trustee under his judgment and charging order.[6]

Also on May 25, 1959, Arnold Porter initiated an Idaho divorce action against his wife, Gladys, praying, *inter alia,* that the court make an equitable division of the couple's community property.[7] On July 10, 1959, Gladys made a personal appearance in the Idaho divorce proceeding and by way of answer and counterclaim therein prayed that she be granted a divorce, that Arnold Porter be ordered to pay her the accrued and all future support and maintenance payments decreed by the Arizona court, and that the Idaho court divide the community property of the parties.[8] In her counterclaim, Gladys specifically alleged that the couple owned a community property interest in the Arizona Hotel.[9]

Shortly after appearing to answer and counterclaim in the Idaho divorce proceeding, Gladys, in Arizona, executed on her Arizona separate maintenance judgment. At a sheriff's sale held on August 20, 1959, she purportedly purchased all of Arnold Porter's interest in the Arizona Hotel,[10] and, according to the majority of the Arizona Supreme Court, thereby became the sole owner of any community interest the couple may have thereto-

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[4]A.R. pp. 31-36, Appendix pp. 60-62.

[5]A.R. pp. 350-51, 296-99.

[6]A.R. pp. 46-55.

[7]Supp. A.R. pp. 1-11, Appendix pp. 63-68.

[8]Supp. A.R. pp. 12-37, Appendix pp. 69-82.

[9]Supp. A.R. pp. 24-25, Appendix p. 75.

[10]A.R. pp. 36A-45.

fore had in the hotel property.[11] There is no evidence of record that Gladys brought the fact of her purchase at the sheriff's sale to the attention of the Idaho divorce court.

Meanwhile, Pearline Porter and Pauline P. Leonard, petitioners herein, intervened in the divorce action to assert and protect their and Arnold's partnership interest in the Arizona Hotel property. The Idaho trial court, with all of the parties before it, entered extensive findings of fact and conclusions of law on December 28, 1960.[12] After noting that all parties had introduced oral and documentary evidence,[13] the trial court made the following findings:

> (1) That the court had jurisdiction of all the parties and the subject matter of the action.[14]
>
> (2) That Gladys Porter was entitled to a divorce.[15]
>
> (3) That the Arizona separate maintenance decree was not entitled to enforcement against the husband in Idaho since he had not been personally served in the Arizona action.[16]
>
> (4) That the Arizona Hotel was partnership property in which the couple owned a community interest.[17]

By judgment and decree dated the same day, the divorce court entered the following orders and judgments:

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[11]Throughout the Arizona litigation, petitioners have consistently maintained that Gladys could not, by executing on her separate maintenance decree and buying in at the sheriff's sale, acquire any of Arnold's interest in the partnership organization. Under Arizona statutory law, an individual's partnership interest may not be sold under attachment or execution for the personal obligation of the partner. See generally, Justice Udall's dissent below, Porter v. Porter, 416 P. 2d 564, 574-75 (1966), Appendix pp. 18-22.

[12]A.R. pp. 300-19, Appendix pp. 83-95.

[13]A.R. p. 301, Appendix pp. 83-84.

[14]A.R. p. 315, Appendix p. 91.

[15]A.R. p. 316, Appendix p. 91.

[16]A.R. pp. 316-17, Appendix pp. 91-92.

[17]A.R. pp. 303-06, Appendix pp. 85-86.

(1) Granted Gladys her divorce.[18]

(2) Ordered the husband, Arnold, to pay substantial alimony to Gladys.[19]

(3) Awarded to Gladys a sizable share of the community property.[20]

(4) Adjudged that the Arizona Hotel was owned by a co-partnership composed of Arnold, Gladys, and the Porter sisters, petitioners herein.[21]

(5) Adjudged that Arnold should be awarded the entire community interest in the Arizona Hotel property.[22]

(6) Ordered that Gladys convey all of her interest in the hotel property to Arnold and the sisters.[23]

(7) Ordered that Gladys dismiss any Arizona action affecting the hotel property.[24]

(8) Enjoined Gladys from initiating any future action affecting the Arizona Hotel.[25]

Pursuant to the Idaho trial court's decree, Gladys, on February 27, 1961, executed quit-claim deeds and an assignment conveying all her interest in the Arizona Hotel property to Arnold and his sisters, petitioners herein.[26] In addition, she formally released her earlier Arizona separate maintenance award.[27]

Gladys appealed to the Supreme Court of Idaho but did not question the trial court's disposition of the Arizona Hotel, its order that she convey to Arnold and petitioners her interest there-

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[18]A.R. p. 325, Appendix p. 97.
[19]A.R. pp. 326-27, Appendix p. 98.
[20]A.R. pp. 327-30, Appendix pp. 98-100.
[21]A.R. pp. 330-31, Appendix p. 100.
[22]A.R. p. 331, Appendix pp. 100-01.
[23]A.R. pp. 333-34, Appendix pp. 101-02.
[24]A.R. pp. 334-35, Appendix p. 102.
[25]A.R. p. 335, Appendix p. 102.
[26]A.R. pp. 344-48, Appendix pp. 104-06.
[27]A.R. p. 349, Appendix p. 106.

in, or its refusal to enforce the Arizona separate maintenance decree. She limited her appeal to that portion of the trial court decree which enjoined her from maintaining any future action affecting the Arizona Hotel. Her arguments on that single point were sustained by the Idaho Supreme Court.[28] Having prevailed on appeal, Gladys did not seek review in this Court by writ of certiorari.

Petitioners Porter and Leonard returned to Arizona, where, together with petitioner Kemble, they filed supplemental complaints in the Arizona separate maintenance action seeking full faith and credit for the portions of the Idaho decree not appealed from by Gladys. Petitioners also prayed that the Arizona trial court quiet their title to the hotel property by decreeing that the hotel was partnership property in which Gladys had no interest and by enjoining her from claiming any interest in the property.[29]

Duly authenticated or certified copies of the Idaho trial court's findings of fact and conclusions of law, its judgment and decree, together with the deeds, assignment, and release executed by Gladys pursuant to the Idaho decree were offered into evidence[30] with the statement by counsel that the full faith and credit clause of the Constitution of the United States required recognition of the Idaho judgment.[31] The trial court refused to admit into evidence the Idaho findings of fact and conclusions of law and the Idaho judgment and decree.[32] However, the deeds, assignment and release executed by Gladys pursuant to the Idaho decree were admitted into evidence.[33] Nevertheless, a directed verdict was

[28]Porter v. Porter, 84 Idaho 400, 373 P.2d 327 (1962), Appendix pp. 49-59.

[29]A.R. pp. 96-104, 124-31, Appendix pp. 107-115.

[30]A.R. pp. 257-58, Appendix pp. 116-17.

[31]A.R. pp. 256-57, 258, Appendix pp. 116-17.

[32]A.R. p. 261, Appendix p. 117.

[33]In its opinion affirming the denial of full faith and credit to the Idaho judgment and decree, the Supreme Court of Arizona held that these instruments were of no effect since the Idaho judgment and decree had been deemed invalid. Porter v. Porter, 416 P.2d 564, 572 (1966), Appendix p. 13.

granted in favor of Gladys Porter.[34] In petitioners' motion for new trial[35] they contended, *inter alia,* that the Idaho court's findings and judgment and decree were entitled to full faith and credit.[36] The trial court denied the motion,[37] and petitioners appealed.

The Arizona Court of Appeals, by unanimous opinion, reversed the trial court, holding that the Idaho decree was entitled to full faith and credit. That court held that the Idaho court could validly order her to convey her interest in the Arizona Hotel property and that the Idaho decree was res judicata as to each and every issue litigated or which could have been litigated in the Idaho proceedings.[38]

The Court of Appeals' opinion was vacated by the Supreme Court of Arizona which held, by a three to two vote (Justices Udall and McFarland dissenting), that the Idaho proceedings were not entitled to full faith and credit. The Arizona Supreme Court also held that the deeds, assignment and release executed by Gladys pursuant to the Idaho decree were of no force and effect.[39]

Petitioners' motions for rehearing in the Arizona Supreme Court[40] were denied on October 25, 1966, by the same three to two vote.[41]

It is in this posture that the case comes to this Court.

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[34]A.R. pp. 267, 272.

[35]A.R. pp. 161-64, Appendix pp. 119-20.

[36]A.R. p. 162, Appendix p. 119.

[37]A.R. p. 274, Appendix p. 118.

[38]Porter v. Porter, 1 Ariz. App. 363, 403 P.2d 298 (1965), Appendix pp. 38-48.

[39]Porter v. Porter, 416 P.2d 564 (1966), Appendix, pp. 1-37.

[40]Appendix pp. 121-54.

[41]Appendix p. 155.

REASONS FOR GRANTING WRIT

I. The Supreme Court of Arizona herein decided important federal constitutional questions involving full faith and credit in a way that directly conflicts with applicable decisions of this Court.

II. The decision constitutes a particularly dangerous precedent if allowed to remain standing, since it deals with a commonplace fact situation that involves important considerations of federalism.

ARGUMENT AMPLIFYING REASONS FOR GRANTING WRIT

I. FULL FAITH AND CREDIT

The full faith and credit clause of the Constitution of the United States together with the legislation enacted pursuant thereto require that the courts of one state give not *some*, but *full* credit to the judicial proceedings of all other states. Such sister-state judgments are entitled to as much credit as they are accorded in the state of rendition. *Johnson v. Muelberger*, 340 U.S. 581, 587 (1951); *Davis v. Davis*, 305 U.S. 32, 39-40 (1938).

The domestic law of Idaho relating to judgments would have prohibited the collateral attack made on the divorce decree by respondent in Arizona. Its courts follow the usual res judicata rule that final decrees of divorce are conclusive and binding on the parties to the action as regards all issues, jurisdictional and otherwise, which were or could have been adjudicated therein.[42] See

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[42] Although, unlike petitioners Porter and Leonard, petitioner Kemble was not a party of record in the Idaho divorce action. Because of his Arizona order charging any of Arnold Porter's partnership interest in the Arizona Hotel property, Kemble succeeded to part of that interest as a result of the divorce court's determination that the hotel property was owned by a partnership in which Arnold had an interest. Under these circumstances, petitioner Kemble would be viewed as being in privy with Arnold, plaintiff in the Idaho action, for purposes of res judicata. See Carver v. Ketchum, 53 Idaho 595, 26 P.2d 139 (1933); Smith v. Kessler, 22 Idaho 589, 127 Pac. 172 (1912); *cf.*, Kite v. Eckley, 48 Idaho 454, 282 Pac. 868 (1929). See generally, Restatement, Judgments, §§ 83, 89 Comments c and g (1942).

Robinson v. Robinson, 70 Idaho 122, 212 P.2d 1031 (1949). Collateral attack by a party to the action is allowed only on grounds of extrinsic fraud.[43] *Treece v. Treece,* 84 Idaho 457, 373 P. 2d 750 (1962).

In its opinion sustaining Gladys' collateral attack and denying credit to the Idaho decree, a majority of the Arizona Supreme Court invoke seven "reasons" to support a result clearly prohibited by settled and well-recognized doctrines of full faith and credit and res judicata. Petitioners will discuss all of these "reasons" immediately below, and will demonstrate that they are totally without merit and that recognition of the Idaho decree was wrongfully refused.

The Arizona Supreme Court, by split decision, held that the Idaho divorce judgment was "fatally defective" and not entitled to full faith and credit for the following seven reasons:

> (1) The Idaho judgment failed to give full faith and credit to prior valid Arizona proceedings.[44]
>
> (2) The Idaho divorce court acted without jurisdiction in distributing the hotel property which was Gladys' separate property and not the couple's community property.[45]
>
> (3) The foreign judgment will not be given greater effect than prior Arizona judgments recognizing that Gladys could obtain as her separate property the couple's community interest in the hotel.[46]
>
> (4) The Idaho trial court had no jurisdiction to entertain petitioners' intervention action.[47]
>
> (5) Jurisdiction over Gladys' separate property, the

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[43]Neither Gladys Porter nor the majority opinion below suggest that the Idaho proceedings were had as a result of fraud.

[44]416 P.2d at 568, Appendix pp. 5-6.

[45]416 P.2d at 568-69, Appendix p. 6.

[46]416 P.2d at 569, Appendix pp. 6-8.

[47]416 P.2d at 569-70, Appendix pp. 8-9.

Arizona Hotel, could not be conferred on the Idaho court by consent.[48]

(6) The Idaho court had no power and authority to "directly affect title" to the Arizona Hotel property.[49]

(7) The Idaho court had no power to adjudicate rights of the partnership in the hotel property, since the partnership organization itself was not a party to the divorce action.[50]

In so holding, the majority of the Arizona Supreme Court overlook established principles of full faith and credit that render untenable each and every "reason" relied upon in denying the Idaho judgment the effect to which it is constitutionally entitled. The discussion below, which will treat each "reason" in turn, clearly indicates that precedents of this Court operate to directly undercut the whole of the majority opinion reasoning and necessarily compel a reversal thereof.

(1) *The Idaho judgment is entitled to recognition and enforcement in Arizona even if it did deny full faith and credit to the Arizona separate maintenance proceedings*:

Petitioners contend that there were no prior Arizona judgments entitled to full faith and credit in the Idaho proceedings,[51]

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[48]416 P.2d at 570, Appendix p. 9.

[49]416 P.2d at 570-71, Appendix pp. 9-11.

[50]416 P.2d at 571, Appendix pp. 11-12.

[51]As for the prior Arizona "adjudication" that Gladys could obtain all of her husband's interest in the hotel property at the sheriff's sale, thereby making it her separate property, Justice Udall, in his dissent in the instant case, convincingly argues that none of these proceedings constitute prior, final judgments on the issue of ownership of the hotel property and were not entitled to full faith and credit in the Idaho court. Porter v. Porter, 416 P.2d 564, 573-77 (1966), Appendix, pp. 15-22.

Gladys did set up the prior Arizona separate maintenance decree in the Idaho divorce action and requested that her husband's obligations for support and maintenance payments thereunder be enforced in Idaho. But, because Arnold was not personally served in the separate maintenance action and did not appear therein, the obligations created in the action

and, if there were, Gladys cannot benefit from her failure to plead them in the Idaho action.[52] If this Court grants the writ of certiorari prayed for herein, petitioners can and will enlarge upon these contentions.

However, it is petitioners' position that this Court need not concern itself with these questions. Because, even if the Idaho courts did err in denying full faith and credit to any prior Arizona judgment or proceeding, it is settled that the Idaho decree is nevertheless entitled to full faith and credit. If Gladys felt that the Idaho trial court erred in this regard, she should have appealed in that action and, if necessary, petitioned this Court for review. The Idaho decree cannot be collaterally attacked on the ground that it wrongfully refused to recognize a prior Arizona judgment.

The leading decision in this regard is *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939). In that case, the Idaho court, with

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were not personal and did not follow him to Idaho. See Vanderbilt v. Vanderbilt, 354 U.S. 416, 418-419 (1957); Estin v. Estin, 334 U.S. 541 (1948). Arguably, any and all rights that Gladys had under the ex parte Arizona separate maintenance decree were extinguished in the Idaho divorce decree and property division with both parties before the court and participating in the action. See, *e.g.*, Gilbert v. Gilbert, 83 Ohio St. 265, 94 N.E. 421 (1911).

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[52] Even if Gladys' purchase of Arnold's interest at the Arizona sheriff's sale constitutes adjudication that the hotel became her separate property, these matters must be brought to the attention of the foreign court if recognition and enforcement is desired. See Roche v. McDonald, 275 U.S. 449, 455 (1928); Garden Suburbs Golf & Country Club v. Murrell, 180 F.2d 435, 436 (5th Cir.), *cert. denied*, 340 U.S. 822 (1950). There is no evidence of record that Gladys informed the Idaho courts of her purchase at the sheriff's sale.

The majority in the opinion below merely assume, without any support of record, that these matters "must have been brought to the attention of the Idaho court." 416 P.2d at 570, Appendix p. 9. Justice McFarland, dissenting, noted that the record did not support the majority's assumption. 416 P.2d at 583, Appendix p. 35.

This unsupported assumption of fact by the majority of the Arizona Supreme Court is not binding on this Court in determining important issues of federalism. See Davis v. Wechsler, 263 U.S. 22, 24-25 (1923); Postal Telegraph-Cable Co. v. Newport, 247 U.S. 464, 473-74 (1918); cf., FTC v. Sun Oil Co., 371 U.S. 505, 512 (1963).

both parties before it, conferred title to certain personal property upon one Mason, after first finding that a prior Washington judgment between the parties which awarded the property to one Pelkes, petitioner's assignor, was not entitled to full faith and credit because of a jurisdictional defect. In a third action, petitioner attempted to rely upon the original Washington decree. This Court held that she was not entitled to rely upon the Washington judgment

> because of the Idaho decision that the Washington probate court did not have exclusive jurisdiction. This is true even though the question of the Washington jurisdiction had been actually litigated and decided in favor of Pelkes in the Washington proceedings. *If decided erroneously in the Idaho proceedings, the right to review that error was in those (the Idaho) proceedings . . . .*
>
> The power of the Idaho court to examine into the jurisdiction of the Washington court is beyond question. *Even where the decision against the validity of the original judgment is erroneous, it is a valid exercise of judicial power by the second court.*
>
> One trial of an issue is enough. The principles of res judicata apply to questions of jurisdiction as well as to other issues', as well to jurisdiction of the subject matter as of the parties. 308 U.S. at 76-78. (Footnotes omitted and emphasis added.)

Furthermore, this Court stated in *Treinies* that it would not pause to determine if Idaho's decision denying full faith and credit to the Washington judgment was a correct one. It stated:

> It is unnecessary to consider whether the Idaho determination as to the jurisdiction of the Washington court was properly made. As the procedure by which a state court examines into the question of the jurisdiction of the court of a sister state is a matter within the control of the respective states . . . it need only be added that

such procedure is subject to question only on direct appeal. *Id.* at 77 n.21. (Citations omitted.)

Other decisions of this Court, both before and after *Treinies*, indicate that the Idaho decree cannot now be collaterally attacked for failure to defer to prior Arizona adjudication. See, *e.g., Sutton v. Leib*, 342 U.S. 402, 408 (1952); *Milliken v. Meyer*, 311 U.S. 457, 462 (1940); *Roche v. McDonald*, 275 U.S. 449, 455 (1928).[53]

(2) *Whether the Idaho court had jurisdiction to order distribution of the hotel property is res judicata in a collateral attack:*

The Arizona Supreme Court held that since Gladys had purchased Arnold's interest in the hotel, making it her separate property, the Idaho court acted without jurisdiction in awarding her interest to Arnold, since under Idaho law[54] the divorce court cannot award the wife's separate property to the husband. *Porter v. Porter*, 416 P.2d 564, 568-69 (1966), Appendix p. 6.

There are several answers to this contention. First, whether incident to a divorce an Idaho court can award one spouse's separate property to another spouse seems to be a question of purely local law, one which the Arizona court cannot decide for Idaho. Second, even assuming that Gladys had informed the Idaho court of the Arizona sheriff's sale,[55] the mere allegation that property is owned separately does not prevent the court from determining the question for itself.

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[53]Numerous other authorities have recognized that the so-called "*Treinies* doctrine" prohibits denial of full faith and credit for this reason. See, *e.g.*, Southard v. Southard, 305 F.2d 730 (2nd Cir. 1962), 65 W. Va. L. Rev. 220 (1963); Lewis v. Lewis, 49 Cal. 2d 389, 317 P.2d 987 (1957); Lynn v. Lynn, 302 N.Y. 193, 97 N.E.2d 748 (1951), *cert. denied*, 342 U.S. 849; Restatement (Second), Conflict of Laws §430d, Illustration (2), §439a, Comments a and e (Tent. Draft No. 10, 1964). Justice Udall, dissenting, correctly noted the applicability of *Treinies* to the case at bar. Porter v. Porter, 416 P.2d 564, 577-78 (1966), Appendix pp. 23-24.

[54]See Heslip v. Heslip, 74 Idaho 368, 262 P.2d 999 (1953).

[55]Petitioners contend she did not. See note 52 *supra*.

However, the short and dispositive answer to this contention is that relitigation in Arizona of this jurisdictional question, if jurisdictional it be, is foreclosed by the doctrine of res judicata. Where the complaining party appeared and participated in procuring the foreign judgment, as Gladys did here, the judgment is res judicata as to all issues, jurisdictional and otherwise, and is entitled to full faith and credit. *Durfee v. Duke,* 375 U.S. 106, 111-114 (1963), and cases cited therein. This constitutional rule obtains even if the particular jurisdictional issue had not actually been litigated, as long as an adequate opportunity to do so was afforded. See *Coe v. Coe,* 334 U.S. 378 (1948); *Sherrer v. Sherrer,* 334 U.S. 343, 351-52 (1948); *Jackson v. Irving Trust Co.,* 311 U.S. 494 (1941).[56] The fact that the Idaho court determined ownership to real property lying in Arizona does not prevent operation of the usual res judicata rule. See *Durfee v. Duke, supra.*[57]

(3) *If the Idaho decree is entitled to full faith and credit, it supersedes any prior inconsistent Arizona judgment between the parties by virtue of the doctrine of res judicata and is entitled to enforcement:*

The "third reason" for Arizona's denial of full faith and credit to the Idaho judgment is the Arizona Supreme Court's statement that a "foreign judgment will not be given greater effect than a domestic judgment on the same issue." *Porter v. Porter,* 416 P.2d 564, 569 (1966), Appendix pp. 6-8.

Such a position completely ignores the simple operation and effect of res judicata doctrine. For if the validity of Idaho decree were to be conceded or established, it then becomes res judicata between the parties as regards all issues actually determined and all issues that could have been determined therein. Restatement,

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[56]See also Restatement (Second), Conflict of Laws §430d (Tent. Draft No. 10, 1964).

[57]See Hancock, *Full Faith and Credit to Foreign Laws and Judgments in Real Property Litigation: The Supreme Court and the Land Taboo,* 18 Stan. L. Rev. 1299, 1319 (1966).

Judgments, Section 42 (1942), describes the effect of the second judgment on a prior inconsistent judgment:

> Where in two successive actions between the same parties inconsistent judgments are rendered, the judgment in the second action is controlling in a third action between the parties.

This rule applies where the actions are brought in different states notwithstanding the contention that the court rendering the second judgment denied full faith and credit to the first judgment or made other errors of fact or law. *Ibid;* Restatement (Second), Conflict of Laws, Section 439a, Comments a and e (Tent. Draft No. 10, 1964).

Many decisions of this Court can be cited in support of petitioners' argument that the subsequent, valid Idaho decree supersedes any prior, inconsistent Arizona determination. However, primary reliance will be placed upon *Sutton v. Leib,* 342 U.S. 402 (1952), which dealt with an analogous situation. In that case, petitioner had married one Walter Henzel, who had just previously obtained an ex parte Nevada divorce from his prior wife, Dorothy Henzel. Later, Dorothy brought a separate maintenance action against Walter in New York, and Walter appeared and defended. The New York court granted Dorothy relief, holding that their prior Nevada divorce was invalid. Petitioner then sued Walter for annulment in New York. Again Walter appeared, litigated, and lost. The New York courts held that the prior Nevada marriage was null and void, since Walter was still legally married to Dorothy at the time of his marriage to petitioner. Addressing itself to the res judicata effect of the New York judgments which invalidated prior Nevada proceedings, this Court commented:

> The New York annulment determines the marriage relationship that is the marital status of petitioner and Henzel, just as any divorce judgment determines such relationship. If the Nevada court had had jurisdiction by

> personal service in the state or appearance in the case of Henzel and the first Mrs. Henzel, its decree of divorce would have been unassailable in other states. *So as to the New York decree annulling the marriage, New York had such jurisdiction of the parties and its decree is entitled to full faith throughout the Nation, in Nevada as well as in Illinois.*
>
> *The New York invalidation of the Nevada divorce of the Henzels stands in the same position.* As Mrs. Henzel was neither personally served in Nevada nor entered her appearance, the Nevada divorce decree was subject to attack and nullification in New York for lack of jurisdiction over the parties in a contested action. 342 U.S. at 408-09. (Footnotes omitted and emphasis added.)

Similarly, in the instant case, the Idaho judgment, rendered with all the parties before it, was entitled to full faith and credit in Arizona. The doctrine of res judicata, as implemented by federal constitutional law, is effective to cause the supercession of the prior Arizona judgments by the subsequent, valid Idaho decree.

> (4) *The question of the jurisdiction of the Idaho court to entertain petitioners' intervention action is solely a question of Idaho law and, in any event, is res judicata herein:*

The court below further concluded that because the Hotel property had become Gladys' separate property, the Idaho trial court was mistaken in its view that the Idaho rules of procedure permitted petitioners' intervention in the divorce action. *Porter v. Porter,* 416 P.2d 564, 569-70 (1966), Appendix pp. 8-9.[58]

The Arizona Supreme Court's reasoning and the result it reaches are both grossly inconsistent with the plain command of the full faith and credit clause. It would deny the Idaho court the right and power to determine for itself the facts before it in de-

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[58]The Idaho rules of procedure governing actions of intervention are printed in the Appendix, p. 156.

ciding whether its own rules of procedure permit intervention in a given case. On both questions, the Arizona court has substituted its judgment for that of the Idaho court.

Even if the Idaho divorce court were mistaken in its belief that its own rules of procedure allowed petitioners' intervention, the mistake was one regarding local Idaho law only and does not offend any command of federal due process. Therefore, the mistake, if any, cannot serve as a basis for denial of full faith and credit.

Whether the decision permitting intervention was one of solely Idaho concern, or whether a wrongful decision would deny to the divorce court jurisdiction over petitioners' intervention action, the questiton is res judicata in the instant action and cannot be made a subject of collateral attack. Since Gladys appeared and litigated in the action, she cannot now reopen the Idaho decree to investigate the correctness of its decisions on matters of law, including jurisdiction. See, e.g., *Milliken v. Meyer,* 311 U.S. 457, 462 (1940); *Treinies v. Sunshine Mining Co.,* 308 U.S. 66, 78 (1939); *American Sur. Co. v. Baldwin,* 287 U.S. 156, 166 (1932).

(5) *Since the Idaho divorce court had jurisdiction over the parties and the subject matter of the divorce, it could validly determine ownership of the Arizona Hotel property and order conveyance of a party's interest therein without having jurisdiction over the hotel property itself:*

Petitioners do not concede the validity of the premises of the Arizona Supreme Court's statement that Gladys could not, by mere consent, confer jurisdiction over the hotel property upon the Idaho court. *Porter v. Porter,* 416 P.2d 564, 570 (1966), Appendix p. 9. First, even if Gladys had merely "consented" to Idaho jurisdiction over the hotel property, the decree would still be entitled to full faith and credit.[59] Second, the divorce court's juris-

[59]Having failed to contest the court's jurisdiction over the property, the decree became res judicata on the question. See, *e.g.,* Coe v. Coe,

(Continued next page)

diction over what the Arizona court describes as Gladys' "separate property" was not conferred by mere consent of the parties, but rested upon extensive findings of fact and conclusions of law entered after substantial proof had been introduced by the interested parties.[60]

It appears to be quite clear, however, that the Idaho court could validly determine title to the property and order a conveyance thereof by a party before the court, even if, for one reason or another, it lacked jurisdiction over the property itself. See, e.g., *Dull v. Blackman,* 169 U.S. 243, 246 (1898), regarding power to determine ownership. See, *e.g., Robertson v. Howard,* 229 U.S. 254, 261 (1913); *Carpenter v. Strange,* 141 U.S. 87, 105 (1891); *cf., Steele v. Bulova Watch Co.,* 344 U.S. 280, 289 (1952), regarding power to order conveyance of property by party to action.

(6) *The Idaho decree did not "directly affect" title to the Arizona Hotel property:*

In announcing a "further reason" for denying the Idaho judgment full faith and credit, the Arizona Supreme Court takes refuge behind the embattled doctrine of *Fall v. Eastin,* 215 U.S. 1 (1909),[61] in holding that the Idaho decree "directly affected" title to Arizona realty. Recognizing, as it must, that the Idaho court's order to Gladys that she convey her interest in the prop-

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334 U.S. 378 (1948); Sherrer v. Sherrer, 334 U.S. 343, 351-52 (1948); Jackson v. Irving Trust Co., 311 U.S. 494 (1941); Restatement (Second), Conflict of Laws §430d (Tent. Draft No. 10, 1964).

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[60]The Idaho trial court's findings of fact and conclusions of law (A.R. pp. 300-19, Appendix pp. 83-95) reveal that the court did not rely merely upon the pleadings in the action in finding jurisdiction. Rather, the determination was made only after the parties had introduced substantial evidence on the question of ownership. No transcript of evidence given in the trial court was prepared.

[61]The doctrine of the *Fall* case, which carves out an exception to the full faith and credit clause, has been subjected to severe criticism. See, *e.g.,* Currie, *Full Faith and Credit to Foreign Land Decrees,* 21 U.Chi.L.Rev. 620 (1954); Hancock, *supra* note 56; Reese, *Full Faith and Credit to Foreign Equity Decrees,* 42 Iowa L.Rev. 183 (1957).

erty to Arnold and the petitioners, and that her compliance therewith did not "directly affect" title to Arizona realty,[62] the Arizona court nevertheless concluded that the Idaho court's determination of ownership of the hotel necessarily "directly affected" title to the Arizona realty. *Porter v. Porter,* 416 P.2d 564, 570-71 (1966), Appendix pp. 9-11.

Such a contention is utterly without merit. If an equity court has the power to order a party to convey her interest in foreign realty and to enforce the order by contempt powers, it follows that the court must also have the power to first determine conflicting claims of ownership in the realty. This principle was expressly recognized in the decision of *Dull v. Blackman,* 169 U.S. 243 (1898). In that case, this Court stated that while litigation respecting title to land ordinarily belongs to the courts of the state wherein the land is situated,

> if all the parties interested in the land were brought personally before a court of another state, its decree would be conclusive upon them, and thus, in effect, determine the title. 169 U.S. at 246.

In the recent decision of *Durfee v. Duke,* 375 U.S. 106 (1963), this Court held that adjudicated issues of fact affecting title to foreign land are subject to the policy of res judicata, and that the decree embodying such adjudication is entitled to full faith and credit. Thus, the Idaho decree and the deeds, assignment and release executed pursuant thereto are not subject to any immunity from the protection afforded by the full faith and credit clause.

> (7) *If the Idaho court erred in not making the partnership organization itself a party to the divorce action, such error is not cognizable in a sister-state collateral attack.*

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[62]The *Fall* decision itself recognizes that foreign equity decrees may validly compel parties to the action to convey their interests in land located outside the jurisdiction of the court. Fall v. Eastin, 215 U.S. at 8, 11. See also Steele v. Bulova Watch Co., 344 U.S. 280, 289 (1952) and Robertson v. Howard, 229 U.S. 254, 261 (1913); Restatement, Conflict of Laws §97 (1934).

Finally, the majority of the Supreme Court of Arizona held that that part of the Idaho decree which determined that the Arizona Hotel property was owned by a partnership was void because the court undertook to adjudicate rights of a party not before it, the partnership organization not being a party to the action by name. *Porter v. Porter,* 416 P.2d 564, 571 (1966), Appendix pp. 11-12.

Whether the Arizona court was right or wrong in its reading of Idaho procedural law is of no consequence.[63] If there was any mistake of law in this regard, it is clear that the judgment cannot be invalidated in a collateral proceeding in another state on account of the error, whether it be an error of law or jurisdiction. See, *e.g., Durfee v. Duke,* 375 U.S. 106, 111-12 (1963), and cases cited therein; *Milliken v. Meyer,* 311 U.S. 457, 462 (1940); *Fauntleroy v. Lum,* 210 U.S. 230, 237 (1908).

II. IMPORTANCE OF DECISION

Review of this decision is also warranted by considerations other than the magnitude of error regarding the doctrine of full faith and credit as applied to the instant case. The fact situation giving rise to this petition for review must occur quite frequently across the nation. Innumerable divorce actions are initiated every year wherein a court of one state is called upon to determine the ownership status of real property located in a sister state and to distribute such property. Undoubtedly, in many such cases, enforcement of the decree is subsequently sought in the state wherein the land is located. Many instances also exist wherein some kind of sister state litigation has preceded the divorce action for which full faith and credit is subsequently sought in the state of initial litigation. In dividing the assets of the couple the divorce court

[63] Reasoning from an Idaho statute (Appendix p. 157) which permits a partnership to be sued in its own name, the Arizona court concluded that the organization *must* have been joined in name in spite of the fact that *all* of the individual partners were named parties to the action. No Idaho statute can be found giving a partnership the right to sue in its own name.

is guided only by general equitable considerations and its own sound discretion. Rarely do both spouses come away completely satisfied with their share of property division.

The decision for which review is being sought herein invokes doctrines that are alien to the letter and spirit of the full faith and credit clause. It wreaks havoc with principles of full faith and credit which prohibit a disappointed participant from relitigating in another state's forum those matters which were or should have been litigated in the state where the divorce was entered. If this decision becomes law, there will be no sanctity in sister-state judgments when they are collaterally attacked in Arizona or in any other jurisdiction following the precedent set by the instant case.

In effect, the Arizona court has permitted a relitigation of the division of the marital assets after a competent court of a sister state has ruled thereon at the request of both husband and wife, both of whom described the Arizona Hotel property as community property in their pleadings and neither of whom appealed the division in Idaho. The award to the husband of all of Gladys' interest in the Arizona Hotel undoubtedly affected the Idaho court's determination of how much she was to receive. Her award in the form of substantial alimony and other community property was surely enhanced as a result of the award to Arnold of her interest in the hotel. By refusing to recognize or enforce the portion of the Idaho decree dealing with the hotel property, the Arizona Supreme Court's decision allows Gladys to receive the benefits of the property division while avoiding its inseparable burden.

The Arizona Supreme Court adopts a provincial view of the doctrine of res judicata in holding that prior Arizona adjudication will not be set aside in favor of a subsequent, inconsistent sister state determination, even if the latter judgment is entitled to full faith and credit. This result completely deprives the full faith and credit clause of any substantive meaning whatever. If a sister state

judgment is entitled to *any* credit, it is entitled to *full* credit. Since the Idaho decree would supersede any prior inconsistent judgment between the parties in Idaho, the courts of Arizona must give the Idaho decree the same effect in Arizona with respect to earlier Arizona litigation. If the result below is allowed to stand, then the rights accorded by the full faith and credit clause become hollow and meaningless.

To support its contention that the Idaho judgment need not be viewed as binding on the parties in Arizona, the majority opinion below relies heavily upon a recent decision of the Supreme Court of Nevada, *Colby v. Colby,* 78 Nev. 150, 369 P.2d 1019 (1962), *cert. denied,* 371 U.S. 888. The *Colby* decision, together with the cases cited for support therein, have been uniformly and roundly criticized as being inconsistent with principles of res judicata embodied in the full faith and credit clause.[64] Reliance upon *Colby* by the Arizona court in the instant case is not only misplaced,[65] it is also indicative of the dangers inherent in allowing a constitutionally disruptive and ill-founded doctrine to survive in an area of law already racked by litigation and emotion. Petitioners respectfully urge this Court to avail itself of this opportunity to review and assess these recent, important developments.

The majority opinion below also incorrectly invokes a dangerously divisive retaliatory doctrine which, without regard for set-

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[64]See, *e.g.,* 63 Colum.L.Rev. 560 (1963); 31 Geo. Wash.L.Rev. 648 (1963); 15 Stan.L.Rev. 331 (1963).

[65]The *Colby* court refused to recognize a Maryland divorce decree as a binding determination of the parties' marital status *in Nevada.* Because the question of litigants' marital status is a matter of "most intimate concern" to the states involved, this Court has suggested that the findings of a sister-state court relating thereto need not be deemed controlling in another domiciliary state. See Williams v. North Carolina, 325 U.S. 226, 230-33 (1945). But see Sutton v. Leib, 342 U.S. 402, 408-09 (1952).

Whatever merit such a suggestion may possess, it would not apply where, as here, the matter at issue is simply one involving ownership of business property. In such a case no special interest of the situs state would be subverted by the operation of the usual res judicata rule which views the subsequent out-of-state judgment as binding on the question.

tled principles of res judicata, denies recognition to a foreign decree because, in the opinion of the Arizona court, another state's courts denied full faith and credit to prior Arizona adjudication.

Invocation of these troublesome legal and constitutional principles by the Arizona Supreme Court brings us to the final consideration. If the Idaho judgment is not deemed conclusive, neither would the instant Arizona judgment settle the litigation. If the Idaho decree is not entitled to full faith and credit in Arizona because it denied recognition and enforcement of alleged prior Arizona adjudication, then the Arizona decision herein would not be entitled to full faith and credit elsewhere, especially in Idaho, because it denied full faith and credit to an Idaho judgment which Idaho views as being conclusive. The Arizona decision merely prolongs the private litigation between petitioners, respondent, and respondent's husband. If, however, this Court were to hold that the Idaho decree is conclusive as between the parties and binding on the Arizona courts, this protracted litigation concerning ownership of the Hotel would be terminated.

CONCLUSION

The holding of the Arizona Supreme Court allowing the relitigation of several legal and jurisdictional issues is in direct conflict with numerous full faith and credit and res judicata principles expounded by this Court over the past half century. Retaliation by the courts of one state for a refusal on the part of another state to enforce the former's judgment, and a refusal on the part of the former to accord the subsequent judgment its normal res judicata effect strike at the core of the interests, public and private, intended to be fostered and protected by the full faith and credit clause.

Petitioners are not alone in contending that the Idaho decree is entitled to recognition and enforcement in Arizona. Of the eight Arizona judges reviewing this matter in the state's appellate courts, five concluded that full faith and credit to the Idaho decree had been wrongfully withheld.

Therefore, petitioners respectfully pray that certiorari be granted to review the judgment and decision in this case.

Respectfully submitted,

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